

clear that Plaintiffs distorted the Court's direction for the parties to file any ESI discovery motions that were ripe for determination no later than ten days prior to the hearing set for September 26, Dkt. 1246. Plaintiffs construed the Court's clear instruction as a license to file a "motion" containing nothing more than a list of gripes and complaints, which they freely admit they have not taken up with the separate Defendants. Peterson is chagrined and frustrated that it is compelled to respond to Plaintiffs' improper filing, and requests the Court take what ever action it deems appropriate to curb such abuses.

RESPONSE TO PLAINTIFFS CONTENTIONS DIRECTED AT PETERSON

Plaintiffs' "Omnibus Motion" was the first notice Peterson received that Plaintiffs had some concern or complaint about the form of Peterson's ESI production to date. Plaintiffs complain to the Court that in some way Peterson is not playing fair with its ESI disclosures. Yet failing to comply with the rules or adhere to fundamentals of professionalism, they did so without first bringing their concerns to Peterson for resolution. Moreover, Plaintiffs' representations about Peterson in their "Omnibus Motion" are materially false.

1. Peterson is Producing ESI in the Format Plaintiffs Agreed to Accept

Plaintiffs create the false impression that Peterson has foisted upon them ESI materials that are not reasonably usable. It confounds Peterson that Plaintiffs did not advise the Court that the format of Peterson's ESI is what they agreed to accept. *See Plaintiffs' Motion for Expedited Hearing on ESI Production*, Dkt. No. 1197 at p. 1, n. 1. Peterson's e-mail production has included Bates-numbered .tiff images of the documents, coupled with a fully searchable text file and a load file. This format loads easily into any industry standard litigation document management tool such as the "Summation"

program. If Plaintiffs had loaded Peterson's e-mail production properly into Summation or any number of readily available programs, they would easily be able to manage, sort and search the documents. Peterson does not know if Plaintiffs lack such a management tool, chose not to use such a tool, or simply do not know how to operate such a tool, because Plaintiffs have never advised Peterson of any of the problems described in their filing.¹ In any event, Peterson's production complies with its agreement with Plaintiffs as well as its obligations under the federal rules by providing trackable document images, coupled with searchable text files.

2. Plaintiffs' Complaints With Regard to Peterson's Grower Accounting ESI are Unfounded

Here again, in their rush to get something before the Court prior to the September 26 hearing, Plaintiffs fail in their "Omnibus Motion" to advise the Court of the salient facts underlying Peterson's production of its grower accounting ESI. Most notably, Plaintiffs fail to advise the Court that Peterson has been producing the Settlement Reports for its current independent contract growers in the IRW since Plaintiffs first propounded written discovery reaching this information in 2006. Peterson identified and produced these reports as electronic .tiff formats for these growers going back to 2002.

Plaintiffs suggest that they are entitled to grower settlement data extending back to 1982. Without rearguing Peterson's objections to producing information about ancient operations that have no apparent link to the current injuries Plaintiffs allege, the Court should be advised that Peterson and Plaintiffs have engaged in conferences to discuss and

¹ If Plaintiffs' problems derive from technology or lack of training, Peterson may be able to assist, and has offered to assist, but it has no duty to act if Plaintiffs choose not to communicate on the issues.

negotiate the extent to which information and documents will be searched and produced for periods older than 2002. These discussions appear to be fruitful, but are still ongoing. By making such naked assertions in their “Omnibus Motion” suggesting that Peterson is simply refusing to cooperate, does violence to the notion of the “meet-and-confer” and the professional and respectful conferences Peterson has held with Plaintiffs on these issues thus far.

Granted, Peterson does maintain raw grower settlement/accounting data on its AS400 system, which is the source of these Settlement Reports; however, Peterson has already complied with its obligations under Rule 34 by producing its grower settlement information as an element of its growers’ files, which is the manner in which Peterson keeps this information in the ordinary course of its business. Plaintiffs’ requests for production did not specify the form of the production; Peterson produced the ESI as .tiff images on Compact Disks;² and Plaintiffs never objected. “Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.” Advisory Committee Notes to 2006 Amendment to Fed. R. Civ. P. 34(b). Thus, by seeking to compel Peterson to re-produce this data in another format simply for their convenience, Plaintiffs would burden Peterson beyond the limits the federal rules will allow.

² Peterson initially produced these .tiff files with the appropriate load files to enable uploading the information into viewer software. Plaintiffs’ counsel complained that he could not figure out how to make the load files work, and at his request, Peterson produced the image files on disk without any load information.

CONCLUSION

Plaintiffs' "Omnibus Motion," Dkt. 1271, is a frivolous filing, submitted for an improper purpose. Had Plaintiffs styled their filing as a Motion to Compel, their admission that they have not complied with the informal conference prerequisites of Fed. R. Civ. P. 37(a)(2)(A) and NDLCvR37.1 would be sufficient grounds for the Court to strike the Motion. Plaintiffs' "Omnibus Motion" deserves the same fate. Notwithstanding Plaintiffs' imprudent decision to file this document, their representations regarding Peterson's productions to date lack candor, and omit the facts that demonstrate that Peterson has and is fulfilling its obligations, while remaining willing to assist Plaintiffs with any technical difficulties, should they ever elect to ask. Accordingly, Peterson respectfully requests the Court strike Plaintiffs' "Omnibus Motion" and grant it any further relief it deems appropriate.

Respectfully submitted,

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